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In the Supreme Court of the United States

OCTOBER TERM, 1979

MARILYN W. ANDRULIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-35a) is reported at 609 F. 2d 514. The opinion of the district court (Pet. App. 38a-39a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 1979. A timely petition for rehearing was denied on January 4, 1980 (Pet. App. 43a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988, expressly waives sovereign immunity so as to authorize an award of attorney's fees against the United States.

2. Whether a waiver of sovereign immunity sufficient to authorize an award of attorney's fees against the United States is provided by the "sue and be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1).

STATEMENT

1. Petitioners are Marilyn W. Andrulis, Ph.D., and Andrulis Research Corporation (ARC), a scientific consulting firm in which she holds a 51% interest (J.A. 109).[1] Andrulis, who holds an Associate Professorship in chemistry, founded ARC in 1971 after enjoying a series of high level scientific consulting positions (J.A. 61, 64-65). In 1977 she applied on behalf of ARC to participate in a Small Business Administration (SBA) Section 8(a) program for small firms controlled by persons who are socially and economically disadvantaged. 15 U.S.C. 637(a); 13 C.F.R. 124.8-1(c) (1977). Firms certified for participation under Section 8(a) become eligible for government procurement contracts without the normal prerequisite of competitive bidding. Andrulis based her request for certification on the social and economic difficulties she had encountered entering the mainstream of the procurement process as a female entrepreneur (J.A. 9-11).

Although the SBA officials who initially examined the application indicated that ARC's eligibility "bears scrutiny," the application was approved by the Washington, D.C., District Office in June 1977. Shortly thereafter, the Administrator of SBA was called before a Senate Subcommittee to testify on perceived abuses in this program, and, in response to congressional inquiries, agreed to discontinue new program entries and rescreen

[1]The remaining 49 per cent interest is held by her husband, also a Ph.D (J.A. 109). "J.A." refers to the joint appendix filed in the court of appeals.

existing participants (J.A. 76-77; 91-92; 104). ARC's application was reconsidered in the wake of this activity, and, in September 1977, rejected on the stated basis that plaintiff, a Caucasian, was neither socially disadvantaged nor, given her career background and net worth, economically disadvantaged.

2. In November 1977, petitioners sued to enjoin SBA from disqualifying ARC from the Section 8(a) program, charging SBA with committing procedural violations of the APA, and with discriminating against Andrulis on the basis of sex and race in violation of 42 U.S.C. 1981 and 1985(c) and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d. A temporary restraining order was entered, following a hearing confined to the alleged procedural irregularities in ARC's termination, and shortly thereafter the suit was settled upon SBA's agreement to reinstate ARC in the program.

A consent decree was then entered and petitioners moved in the district court for an award of attorney's fees, relying on the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. 1988 ("the Act"). That statute provides, *inter alia*, that attorney's fees may be awarded in the discretion of the court to parties prevailing in a proceeding to enforce a number of civil rights statutes, three of which had been pled by petitioners. The district court awarded petitioners attorney's fees over the government's objection that 42 U.S.C. 1988 does not contain an express waiver of sovereign immunity necessary to overcome the prohibition against such an award codified in 28 U.S.C. 2412.[2]

[2]28 U.S.C. 2412 proscribes awards of attorney's fees against the federal government "[e]xcept as otherwise specifically provided by statute."

3. On the government's appeal, a divided panel of the court of appeals reversed, concluding that the award was barred by 28 U.S.C. 2412. The majority noted this Court's "well established precedent" that "waiver of federal sovereign immunity 'cannot be implied but must be unequivocally expressed.' *United States* v. *King*, 395 U.S. 1, 4 (1969)," and observed that 28 U.S.C. 2412 "has been consistently construed as immunizing the United States against attorney's fees awards absent clear or express statutory authority to the contrary" (Pet. App. 4a). The majority explained that Congress had nowhere provided in 42 U.S.C. 1988 that the "United States shall be liable for costs the same as a private person," in contrast to its choice of language in the host of other statutes waiving federal immunity against attorney's fees (Pet. App. 5a-6a). The majority rejected petitioners' reliance on the phrase "any action" in the provision in 42 U.S.C. 1988 that awards may be allowed "in any action or proceeding to enforce [specified civil rights statutes]," since that phrase has "repeatedly appeared in attorney's fees provisions, yet when in the past Congress has sought to override 28 U.S.C. §2412 it has apparently considered it necessary to add a phrase explicitly establishing the liability of the United States" (Pet. App. 7a, footnote omitted).[3]

The majority rejected petitioners' contention that the present case is controlled by *Hutto* v. *Finney*, 437 U.S. 678 (1978), in which this Court held that the Act abrogates the States' Eleventh Amendment immunity despite the absence of an express waiver. The majority explained (Pet. App. 9a-12a) that the express bar to fee awards against the United States codified in 28 U.S.C. 2412 is more difficult to overcome than the general immunity of the States under the Eleventh Amendment, and that, in contrast to the legislative history relied upon in *Hutto* to show the intent of Congress to permit fee awards against the States, there was "[n]o such unequivocal indication of congressional intent * * * with respect to the issue of federal immunity." Finally, the majority (Pet. App. 12a n.12) rejected petitioners' alternative argument that the necessary waiver can be found in the "sue and be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1).

[3]The Act does expressly waive federal immunity in a limited class of Internal Revenue Service cases. See *Aparacor, Inc.* v. *United States*, 571 F. 2d 552 (Ct. Cl. 1978).

Chief Judge Wright, dissenting, adopted petitioners' argument based on the "any action or proceeding" language of 42 U.S.C. 1988, and asserted that congressional intent to waive federal immunity could be inferred from the legislative history of that provision (Pet. App. 14a-15a, 19a-20a). He declined to reach petitioners' "sue and be sued" clause arguments (Pet. App. 14a n.2).

ARGUMENT

The decision below is correct and does not conflict with the decisions of this Court or the courts of appeals. Further review by this Court is unwarranted.

1. Petitioners recognize that 42 U.S.C. 1988 does not contain the language traditionally employed to waive federal sovereign immunity, but argue that the Act should nevertheless be construed as waiving sovereign immunity by necessary implication. This argument is unpersuasive.

As we explained in our brief in opposition to the petition for certiorari in *Shannon* v. *HUD*, 577 F. 2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978),[4] which raised

[4]We rely on the arguments advanced in our brief in opposition to the petition for certiorari in *Shannon* v. *HUD*, No. 78-369, a copy of which is being furnished to counsel for petitioners.

the identical question presented here, 28 U.S.C. 2412 can be overriden only by a statute that unequivocally waives federal sovereign immunity. That waiver is not supplied by the phrase "any action or proceeding," and, as we demonstrated in *Shannon*, the legislative history of the Act does not compel—or even support—the inference that Congress intended to enact such a waiver. Indeed, if any inference may be drawn, it is that Congress intended *not* to subject the federal fisc to such awards under this "narrow" statute, but rather to defer until a later day consideration of more expansive bills[5] "which would go far beyond the 'American Rule' or 'private attorney general' exception to it, and which may allow recovery against the Federal Government" (letter of Mr. Rodino introduced in Senate, 122 Cong. Rec. 32184 (1976)).[6]

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[5]S. 265, which would amend 28 U.S.C. 2412 to authorize attorney's fee awards against the United States whenever a statute provides for such awards against private litigants, was passed by the Senate last year. 125 Cong. Rec. S10924 (daily ed. July 31, 1979). It is pending in the House of Representatives.

[6]Petitioners assert (Pet. 13) that the government was unable to cite "a shred of direct evidence suggesting that Congress intended to except the federal government, as opposed to all other civil rights defendants" from the attorney's fee award provisions. But as we demonstrated in our brief in opposition to the certiorari petition in *Shannon* (pages 5-7), that intent is manifest from the internal structure of the Act, and directly evidenced in numerous portions of the legislative history. The attempts of petitioners and the dissent to undercut this abundance of evidence fails. For example, both the House and Senate Reports accompanying the various attorney's fee bills (written before the amendment to allow for limited awards against the federal government in cases brought under the Internal Revenue laws) stated that the government would incur "no additional cost" as a result of this legislation. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 7 (1976); H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 9-10 (1976). The dissent attempts to resist the plain import of these statements by theorizing that the payments are "apparently made" from a Justice Department litigation fund that was never increased to account for awards in IRS cases, and by pointing to a remark of

Order on

Nothing has occurred since the Court denied certiorari in *Shannon* to make this question worthy of review. Indeed, consideration by this Court is even less warranted now because the Third Circuit has since been joined in its interpretation of the Act by the District of Columbia Circuit in this case; and, more recently, in *Hampton* v. *Hanrahan*, petition for rehearing Nos. 77-1698, 77-1210, and 77-1370 (7th Cir., Apr. 15, 1980), the Seventh Circuit struck a portion of an earlier order on which petitioners relied (Pet. n.18), which had arguably authorized an award of attorney's fees against the United States in a suit brought against, *inter alia*, federal officers for alleged deprivations of the plaintiffs' civil rights.[7] No court of

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former Assistant Attorney General Rex Lee that fee awards would "reduce already available resources" (Pet. App. 28a). In fact, funds for the IRS awards are drawn from the judgment fund established by 31 U.S.C. 724a (*see* Comp. Gen. Opinion B158810 (Feb. 22, 1977) (unpublished)), which is replenished on a yearly basis by appropriations gauged to take anticipated expenditures into account. And Mr. Lee's remarks—made at the early hearing stage when several very different versions of the legislation were being considered—actually were intended to demonstrate that monies appropriated by Congress to cover fee awards would be diverted from other, perhaps more fruitful purposes. Similarly, the dissent incorrectly relies on remarks made by Rep. Drinan, during the 1975 hearings for the proposition that H.R. 9552 (which became the House version of the bill finally enacted) would override 28 U.S.C. 2412. Rep. Drinan was, in fact, making a blanket statement about three bills, including H.R. 9552, H.R. 8742, H.R. 8743, the last two of which contained additional language specifically waiving federal sovereign immunity. When the final version of the bill—omitting that language—was presented for debate, Rep. Drinan made it clear that such awards would not involve "a single dollar of Federal money." 122 Cong. Rec. 35117 (1976).

[7]The pending petition filed by the federal petitioners in No. 79-914, *Johnson* v. *Hampton*, seeking review of the Seventh Circuit's earlier decision in *Hampton* v. *Hanrahan*, 600 F. 2d 600 (1979), raises an issue respecting 42 U.S.C. 1988 that is entirely distinct from the question presented by petitioners here. There is, accordingly, no reason to hold this case pending the disposition of *Johnson* v. *Hampton*.

appeals has expressed a contrary view. Petitioners (Pet. 15 n.18) and the dissent below (Pet. App. 19a-20a) assert that circumstances have been altered by this Court's decision in *Hutto* v. *Finney*, 437 U.S. 678 (1978). That case was decided before the petition for certiorari was filed in *Shannon*, however, and the government in its brief in opposition to the *Shannon* petition (page 7) rebutted a contention identical to that raised here. The same reasoning was correctly employed by the majority below.

Petitioners also contend (Pet. 10-13) that because Congress intended to encourage private enforcement of the civil rights laws through its amendment of 42 U.S.C. 1988, it must also have intended to waive the sovereign immunity of the United States as to attorney's fee awards. This contention is without merit. The central congressional aim was to fill the gap created by the ruling in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), that private parties cannot qualify for fee awards under the "private attorney general" exception to the so-called American Rule previously adopted by several lower courts. S. Rep. No. 94-1011, 94th Cong. 2d Sess. 1, 4 (1976); H.R. Rep. No. 94-1558, 94th Cong. 2d Sess. 2 (1976). *Alyeska* created no gap with respect to federal immunity, for the lower courts had uniformly recognized that fees could not be awarded against the United States absent a statutory waiver of 28 U.S.C. 2412. Thus, filling the "gap" did not necessarily entail waiving the immunity of the United States. Moreover, when it enacted the Act in 1976, Congress would have had little reason to believe that a refusal to waive federal immunity would have an appreciable effect on the enforcement of the specified civil rights statutes; for as the panel majority below recognized (Pet. App. 8a, 8a-9a n.9), actions under the Reconstruction Era Civil Rights Statutes are usually brought against individuals or state or local governments,

not the federal government or its officers; and federal aid recipients rather than the United States were the most obvious possible defendants in suits under the remaining civil rights statutes covered by the Act. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 715-716 n.51 (1979).

2. Petitioners also assert (Pet. 15-17) that the requisite waiver of federal immunity in this particular case can be found in the "sue or be sued" clause of the Small Business Act, 15 U.S.C. 634(b)(1). The court below properly rejected this contention[*] and there is no contrary appellate authority. Review by this Court is accordingly unwarranted.

First, 15 U.S.C. 634(b)(1) permits suits against the Administrator of the SBA but expressly precludes injunctive relief. The present suit is an action (based on different statutes) for an injunction directing ARC's reinstatement to the assistance program. It is frivolous to suggest that Section 634(b)(1) waives a statutory immunity against the award of attorney's fees (28 U.S.C. 2414) in connection with suits to which Section 634(b)(1) has no application.

Second, even were suits for injunctive relief allowed under 15 U.S.C. 634(b)(1), petitioners' reliance upon that section would be unavailing, because the waiver of immunity to suit that it embodies does not contain the precise language permitting attorney's fee awards against the United States that is required to overcome the specific language of 28 U.S.C. 2412. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, *supra*, 421 U.S. at 267-268. Nor is petitioners' argument advanced by their reliance (Pet. 16) on *RFC* v. *Menihan Corp.*, 312 U.S. 81, 85-86

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[*]The dissent (Pet. App. 14a n.2) expressly declined to reach this question.

(1941), for the proposition that "sue and be sued" agencies are not immune with respect to the "usual incidents of suits in relation to the payment of costs and allowances." The award of attorney's fees is by no means a "usual incident" of suits, and Congress clearly would not have contemplated such payments as coming within the limited waiver it enacted in 15 U.S.C. 634(b)(1).[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9]Although this precise argument was apparently not made in either case, it is nonetheless noteworthy that courts have found "sue or be sued" agencies immune from attorney's fee awards in *Shannon* v. *HUD*, *supra* (see 12 U.S.C. 1702, permitting the Secretary of HUD to sue or be sued); and *Cassata* v. *Federal Savings and Loan Insurance Corp.*, 445 F. 2d 122 (7th Cir. 1971) (see 12 U.S.C. 1725(c)(4)).